Supreme Court, U. S.
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80-271

No._____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

Malcolm Eugene Ratliff ..... *Petitioner*

v.

United States of America ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED BY REVIEW

1. The Court erred in denying petitioner's motion to dismiss the indictment upon the basis that the Government breached its promise not to prosecute petitioner.

2. The Court erred by denying petitioner's motion to strike the testimony, opinion and factual, of Reinhardt Mintken on the basis that the Government did not produce the underlying documentary evidence and secret signs and symbols upon which his testimony was based.

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Petitioner, Malcolm Eugene Ratliff, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 27, 1980.

OPINION BELOW

The opinion of the Court of Appeals in this cause has not yet appeared in the official Federal Reports, but a copy thereof is a appended hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked because of various prejudicial errors in failing to dismiss the indictment of the petitioner based on the breach by the Government of a prosecutorial promise not to prosecute, which involved the violation of petitioner's right to effective counsel and right to due process of law, and the admission of prejudicial evidence over petitioner's objections, thereby violating petitioner's constitutional rights of due process, confrontation, compulsory process, and cross-examination. The judgment sought to be reviewed was entered on June 27, 1980. No petition for rehearing was filed, but application for stay of mandate was made to that court on July 14, 1980, and stay was granted until August 22, 1980, by order of the Court of Appeals dated July 22. Title 28 USCA 1254 (1) confers upon this court the jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution Sixth Amdendment, United States Constitution.

STATEMENT OF THE CASE

On August 6, 1979, the Federal Grand Jury for the Eastern District of Arkansas returned an eight count indictment (DR 1, P. 1-6) against petitioner, Malcolm Eugene Ratliff, and co-defendant, Carl Edward Friend, charging them with violating Title 18, United States Code §1014 and §371.

On August 24, 1979, a bill of particulars was filed by petitioner Ratliff seeking to discover the essential facts with showed that the petitioner overvalued Rhine Westphalia Electric Power Corporation Bonds. (DR 4, P. 11-12) On the same date, petitioner Ratliff filed a motion to require the Government to furnish him a list of the names and addresses of all witnesses the Government intended to call at trial. (DR 2, P. 8-10) Both motions were denied. (DR 8, P. 16-17)

That which developed at trial was as follows:

A. The Indictment Transaction

In September of 1976, petitioner, a resident of Memphis, Tennessee, purchased pre-World War II German bonds in exchange for $100,000.00 face value State of Texas General Obligation bonds. (T. 194)

Later in 1976, co-defendant, Carl Friend, received some of the pre-World War II German Rhine Westphalia Electric Power Corporation Bonds from Malcolm Eugene Ratliff (T. 227) which bonds both Friend and petitioner believed to be valid. (T. 261)

Friend, a Memphis, Tennessee resident, was referred in November 1976 by a man named Fauts to Paul Farrell the owner of the First National Bank of Brinkley to secure a loan using the bonds as collateral. (T. 230) Farrell approved the loan and instructed Larry Guthrie, the bank executive vice-president, to check on the validity of the bonds by calling a broker named Wilson in Memphis, Tennessee, whose name was furnished to Guthrie by Paul Farrell. After doing so, Guthrie received information the bonds were good and he completed the paper work on the first loan on November 18, 1976, and on subsequent loans to Carl Friend on November 27, December 7, December 13, and December 27 of 1976. (Gov. Ex. 7, 8, 9 and 10) (T. 171)

The loan was made by executive vice-president Larry Guthrie based on the recommendation of owner Paul Farrell (T. 235), and, according to Mr. Guthrie, at the time of the first loan, appellant had made no representation to him about the bonds. (T. 363)

According to Carl Edward Friend, convicted felon who had been granted immunity from prosecution and against whom all charges had been dropped (T. 224, 225), Petitioner had accompanied him to Brinkley, Arkansas, on the first and second trips (T. 237) and had represented that petitioner had checked on the bonds and the bonds were worth approximately $2,500.00 a piece. (T. 236) Friend stated petitioner was to receive 25% of the loan proceeds for Carl Friend's use of the bonds (T. 271) and at such time as the loan was repaid petitioner was to get the bonds back. (T. 233) The payments were to be made by check. Government's Exhibit 16. (T. 235) Petitioner never received any money for two of the checks because they bounced. (T. 268)

According to Friend, Parrin Shappley and Jack Wilson were paid $250.00 each on instruction from petitioner. (T. 256, 257)

According to Friend on December 15, 1976, in a meeting petitioner had told Larry Guthrie that a telegram (Gov. Ex. 15) was evidence that the bonds were worth $2,500.00 a piece. Executive vice president Larry Guthrie did not remember whether Friend or petitioner had given him the telegram or if he had received it in the mail. (T. 359) Larry Guthrie had wanted the telegram in his files so that he would have as much information as possible in his files about the bonds. (T. 260)

In 1977 the loan was in default. Larry Guthrie and Paul Farrell arranged a meeting with Carl Friend and petitioner at the bank's attorney's office. (T. 242) Carl Friend told the attorney the bonds had come out of his grandfather's estate in Garland County and that he could submit proof they had been there since January 1, 1945. (T. 243) Carl Friend never produced any written proof that the bonds had come out of his grandfather's estate. (T. 244) The purpose of the meeting was not to defer action on the loans but to validate the bonds. (T. 291) No action with reference to a loan was taken by the bank as a result of that meeting. (T. 367)

The pre-World War II German bonds have never been presented for payment.

The testimony of a German National, Reinhardt Mintken, was introduced over petitioner's objection to prove the pre-World War II German bonds were worthlesss.

B. The Testimony of the German National, Reinhardt Mintken

Reinhardt Mintken is the chief of the Security Department of the Dresdner Bank in Essen, Germany (T. 481), which is the Examining Agency for the German Government for issues of bonds known as Rhine Westphalia Electric Power Corporation Bonds and Ruhr Gas Bonds. The Examining Agency was formed under the Validation Law of German Foreign Currency Act of 1952 and the London Debt Agreement of 1953 to prevent the issuers of the bonds from paying the bonds twice. (T. 405)

After the first World War, many German institutions had taken up issued bonds. Among those were the Rhine Westphalia Electric Power Corporation Bonds with four issues in the United States in the total amount of $65,000.000. Many of these issues, for a variety of reasons, had come back into German. (T. 403)

The bonds in this case are Rhine Westphalia Electric Power Corporation bonds of the 1925 issue which mature in 1950. These bonds were in the undamaged vaults of the Reichsbank after World War II in 1945 when the Russian troops opened the vaults and took the bonds. (T. 405) The Rhine Westphalia Electric Power Corporation is presently in existence and is the greatest utility corporation in Europe. (T. 434)

The Examining Agency in its beginning had made a master list of all the bad serial numbers of the bonds present in Berlin at the close of the war by having the German banks present their records of the bonds lost and the bond issuer present his records. The list of the original 10,000,00 bonds issued had been constructed in 1925. (T. 449) A second list of 4,018,000 bonds redeemed prior to 1939 (T. 450) was acquired

by the Examining Agency in 1952 from the trustee, the First National City Bank of New York.

Another list of 4,191,000 repurchased bonds was compiled by the department of the Dresdner Bank in Essen, Germany. The information to compile this last list came in response to several notices in the paper in 1952 for persons to present their losses to the Examining Agency. (T. 433) From 1953 until 1958 the bonds could be registered at the Validation Board in New York and at the Examining Agency in Germany (T. 407) The numbers of all of the bonds which were in Berlin and were lost to the Russians were then marked as were all of the bonds which were in the meantime registered. (T. 430, 431)

After 1958 1,791,00 bonds were left in circulation.

To verify a bond, Mintken checks the bond serial number against his master list and the records from all of the bonds to determine if the bonds were lost to the Russians at the end of the war. (T. 432) Additionally, to determine whether the bonds are valid, a comparison of number of the bond must be made with the records of the bonds stolen which are contained in a special vault at the bank. (T. 449) According to these records, 29 bonds each of One Thousand Dollar face value are presently outstanding and valid. (T. 408)

Practically, to cash a Rhine Westphalia Electric Power Corporation Bond, it is necessary to present the bond and an application form to the agency and to prove the bond was abroad on January 1, 1945, or, if the bond was in Germany, that the presenter of the bond was the justified legal possessor of the bonds since January 1945. The Examining Agency then checks the bond and presents the application

form with a statement to the court (T. 409) to get a declaratory decree of validation. Since 1958 a person would have to prove, in addition, that the bonds were held under hardship. (T. 411)

The master list is a looseleaf document which would not have been difficult physically for him to have copied. (T. 427)

After high school qualification Mintken had served 1½ years in an apprentice in the Dresdner Bank. (T. 481) He has been in banking since 1951 and with the Dresdner Bank since 1964. (T. 396-397) He has not studied law but is familiar with the German law of redemption of the bonds by practice and experience. (T. 408) Mintken had no personal knowledge of the notice publication in 1952, since he was not at the Dresdner Bank at that time and had nothing to do with Rhine Westphalia Electric Power Utility Corporation bonds at that time. (T. 433, 434)

Based upon Mintken's experience, training and examination, as stated, of the records and documents at the Dresdner Bank, the 120 bonds in this case, Government's Exhibit 25, were in Berlin in 1945 and are thus worthless. (T. 417)

It would be possible for someone to have had these particular bonds in their grandfather's estate and for them to be valid. (T. 465)

The petitioner was not permitted to examine the master list, nor the records upon which the testimony of the German was based; nor were they produced for either the District Court to examine or to be introduced into the record.

Neither was the German required to produce the entire secret code, some of which was marked on Exhibit 25. (T. 457) The German claimed the master list and records were state secrets that he could not reveal. (T. 452) He had not been asked to bring with him from Germany the master list or records, but he would not have brought those documents had he been asked to do so by the United States Attorney which he was not asked to do. (T. 460) Only Mintken and his secretary can see the code (T. 458) so the petitioner could not see it. (T. 453, 457) A booklet from which Mintken had been testifying was not made an exhibit even though on the face of the document it contained a statement saying there may be errors in it. (T. 452)

The Court refused to order Mintken to produce the underlying documents so that the Court could determine the existence of the privilege because there was no way to produce by subpoena the documents from Germany. The Court refused to strike the testimony of Mintken.

PETITIONER'S DEFENSE

Petitioner honestly believed the bonds were good and still does so believe, and that he has never made any material representations knowingly false to a bank.

Counsel for petitoiner and the Government stipulated that counsel for petitioner had contacted Fletcher Jackson, counsel for the Government, and informed him that the petitioner agreed to take a polygraph examination at petitioner's expense by a polygraph operator of the Government's choosing and that petitioner would agree that the results of the test, regardless of what it might be, could be introduced into evidence. Mr. Jackson agreed to check with

Mr. Dillahunty, his then superior and report back. Mr. Jackson reported back that the Government would not agree to that arrangement.

The Government and the petitioner also stipulated that Mr. Ratliff, petitioner, then took a polygraph test from Mr. George Stewart, who is a retired FBI polygraph operator who lives in Jonesboro, Arkansas, and whom the Government stipulated, is a qualified polygraph operator. They further stipulated that the test was taken and the results of the test were furnished to the United States Attorney. (T. 522) (Test results showing petitioner was truthful and an offer to prove state of the art of the polygraph were proffered by petitioner. (Ex. A on Nov. 8 and T. 401)

THE GOVERNMENT'S PROMISE NOT TO PROSECUTE (VOLUME I)

In late 1976 petitioner Ratliff received phone calls from FBI agents Masten and Hart seeking petitioner's cooperation in an investigation with reference to pre-World War II German bonds. Petitioner refused to cooperate with them unless they granted him full immunity; petitioner told them that if they would grant him full immunity, he would help the agents find the source of the bonds. (T. 59, 126, 127)

On January 4, 1977 petitioner gave agents Masten and Hart an interview and advised Masten he wished to furnish information regarding his purchase of $500,000.00 worth of German bonds. (T. 58, 60) Both at that meeting and in subsequent phone calls from Masten and Hart, the agents were advised by petitioner that if they would grant him full immunity, he would cooperate with them. (T. 126, 127)

From April to June, 1978, agent Hart from the FBI's Memphis, Tennessee office was participating in an investigation of pre-World War II German bonds at Brinkley, Arkansas, which originated from the Little Rock FBI office. (T. 61, 62)

In April of 1978, agent Hart on a separate matter had discussed with appellant a situation involving pre-World War II German bonds and a lawyer named Joe Salem in Atlanta, Georgia. (T. 63)

Moreover, at approximately this same time agent Hart was actively investigating petitioner and the German bonds in two other transactions: one involving the CNI Bank of Memphis which allegedly occurred on December 28, 1976; the other, a man named Gwaltney of Memphis which allegedly occurred on November 18, 1976. (T. 65) Hart also had numerous other meetings and phone conversations with petitioner during this time. (T. 65)

A trip to New York by petitioner on behalf of the FBI was also discussed. (T. 94)

In late May of 1978 agent Hart relayed to petitioner an offer from the United States Attorney in North Carolina which contained the conditions to which the United States Attorney would agree for an interview with Ratliff. Agent Ezelle wanted to interview petitioner because petitioner's automobile had been observed at the airport in Memphis on December 17, 1976, when a Mr. Tripoli was observed picking up 4,000 pieces of German External Loan Bonds that a New York atttorney Teplin had used at a North Carolina Bank. (T. 44) According to agent Hart the offer communicated was to not prosecute petitioner on any German bond matter in the

North Carolina District. (T. 73) Agent Ezelle of the Charlotte, North Carolina office of the FBI received a request for full immunity for petitioner from and through agent Hart. In exchange petitioner was to give agent Ezelle 250 pieces of the bonds, tell the agents where the remaining ones were and give them a truthful statement. (T. 53, 54)

According to Ratliff he had been advised in a phone conversation from Agent Hart that he had been granted full immunity with any German bonds with which he had dealt if he would cooperate with them. (T. 129)

Agent Hart denied petitioner ever made a request for immunity specifically in connection with the Brinkley, Arkansas, transaction (T. 78) and stated that Ratliff agreed to meet with agent Ezelle to see what the letter from the United States Attorney contained and then to give the agents his answer as to whether or not he would cooperate. (T. 83)

Ezelle revealed an internal FBI teletype dated June, 6, 1978, reference the negotiations between Ratliff and the FBI:

> "Until recently, Ratliff has refused to cooperate with the FBI in this matter. However, recently Ratliff requested a grant of immunity and stated that he would cooperate. Instead of a grant of immunity, Charlotte obtained a USA declination in writing re: Ratliff in the Teplin matter only. In view of this, Ratliff has advised he will, one, surrent to bureau agents approximately 250 of the $1,000.00 bonds which he obtained at instant motel; two, he will consent to an interview of this entire matter; and three, will furnish the information he has to the whereabouts of the remaining three and one-half suitcases of bonds." (Ex. 6) (T. 46, 47)

A meeting in Memphis, Tennessee, between Ezelle, Hart, and Ratliff, resulted on June 7, 1978. According to the agents, a letter declining federal prosecution of Ratliff from the United States Attorney in North Carolina was delivered to him addressed to Herbert L. Monahan from Harold Edwards, U.S. Attorney, signed by Harold J. Bender, D.C., U.S. Attorney:

> "This will confirm mv conversation on Mav 31. 1978. with special agent, Otho Allen Ezelle, Jr., in which I declined federal prosecution of Malcolm Ratliff of Memphis, Tennessee, regarding his involvement with pre-World War II German bonds in this specific investigation." (T. 43) (Ex. A, T. 42)

According to agent Ezelle, the letter referred to an investigation regarding Milton A. Teplin, an attorney in New York City involving Twenty Three Million Dollars face value in pre-World War II German External Loan bonds of 1924, (T. 24) which were brought from East Berlin during November 1976 and were given to Ezelle and another FBI agent while they were acting as bankers at a North Carolina National Bank as collateral on a Five Million Dollar loan. (T. 44)

Agent Ezelle did not know if going to New York was part of the arrangement with Ratliff. (T. 53)

According to Hart, after Ratliff read the letter of declination of prosecution, he gave a statement on the bonds, was interviewd by Ezelle and made available to Ezelle a large stack of bonds. (T. 84) According to the agents, it was made clear to petitioner he was not being given a general grant of immunity. (T. 47)

At the end of the June 7, 1978 meeting Hart and Ratliff had a private discussion in connection with agent Hart's

investigation of a New York matter involving pre-World War II German bonds (T. 83) which was also ongoing at this time. According to Hart, whatever Ratliff was getting in terms of immunity was not tied to the trip to New York. The New York trip had nothing to do with the Brinkley, Arkansas transaction or the North Carolina transaction, but rather the New York investigation was Hart's investigation out of the FBI's Memphis, Tennessee office. (T. 85)

On June 8, 1978, Ratliff accompanied agent Corbett Hart to New York. On the trip to New York he made full disclosure to Hart about the Bank of Brinkley transaction with reference to which he had previously been contacted but about which he had previously refused to talk until immunity had been obtained. Ratliff has assisted the FBI in New York on four different occasions and in Atlanta on one occasion. At those times Corbett Hart was present and was wearing a body microphone.

But for the assurance of the FBI, Ratliff would not have gone to New York. Ratliff has never been read his Miranda rights nor advised that he had a right to have an attorney. (T. 140) United States Attorney, Harold Edwards and Harold J. Bender, Assistant United States Attorney, the signatory of the letter of declination of prosecution did not testify. Herbert L. Monahan, Jr., special agent in charge, Federal Bureau of Investigation, Charlotte, North Carolina, the person to whom the letter of declination was addressed did not testify. (Vol. I)

After a hearing on petitioner Ratliff's Motion to Dismiss the Indictment because the Government breached its promise not to prosecute the petitioner, the District Court made the following findings of fact: That the New York

operation and the negotiations concerning the North Carolina investigation were independent and unrelated, and petitioner understood that this was so (T. 529) and there was a promise not to prosecute the petitioner with regard to some transactions involving some German bonds. (T. 529, 530) The District Court held that a promise not to prosecute when it is relied upon is judicially enforceable as a matterof constitutional law, and the proper remedy for a violation of that promise where there has been actual reliance, is the dismissal of any indictment which is brought in contravention of the agreement not to prosecute. (T. 533) The District Court made the further finding of fact that the promise not to prosecute which is under consideration was specifically limited to those transactions under "specific investigation" in North Carolina. That is, the so-called Teplin investigation of certain German External bonds which passed through North Carolina and which are not the subject of this prosecution. The Court concluded that the Government's promise not to prosecute had apparently been kept. (T. 533) Appendix B.

With reference to whether or not the promise was communicated to the petitioner and whether the petitioner was adequately informed of the lmits of the Government's promise, the court found that the petitioner was made aware of the precise limits on the promise not to prosecute and that he understood the rights he was giving up in agreeing to cooperate with the Government, principally his right to remain silent (T. 538), and he voluntarily gave up those rights. (T. 539) Appendix B.

The Assistant United States Attorney stated to the court that the statements given by Ratliff dealing with the matter involving the Bank of Brinkley and the German bonds were not to be used in this case. (T. 67)

At the close of the Government's case, Counts III, IV and V were dismissed by the court. After the petitioner rested his case, the jury found the petitioner Ratliff guilty of Counts I, II, VI, VII and VIII.

Post trial motions were filed in substance on the failure of the court to strike the testimony of Mintken. The District Court, the Honorable Garnett Thomas Eisele, denied these motions by memorandum order dated January 7, 1980. Appendix D.

On January 18, 1980, pursuant to said convictions, petitioner was sentenced as follows: To be committed to the custody of the Attorney General for Imprisonment for a period of thirty days on Count VIII, imposition of sentence on Counts, I, II, VI and VII was suspended and petitioner was placed on probation for a period of five years on each count to run concurrently but to be consecutive to the terms of imprisonment imposed on Count VIII on the condition that petitioner obey all local, state and federal laws and that he comply with the rules and regulations of the probation office. It was further ordered that petitioner pay a fine to the United States in the amount of $2,500.00 on each of the five counts, to be paid withing twelve months or to stand committed. Execution of the sentence of imprisonment was stayed pending the outcome of the appeal.

Jurisdiction of the District Court was based upon 18 USCA §1014 and 18 USCA §371. Jurisdiction of the court of appeals was based on 28 USCA §1291.

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT UPON THE BASIS THAT THE GOVERNMENT BREACHED ITS PROMISE NOT TO PROSECUTE PETITIONER.

1. Petitioner was denied his Sixth Amendment right to effect assistance of counsel by not being informed of his right to be represented by an attorney and having legal representation prior to waiver of his constitutional rights.

Petitioner is a businessman from Memphis, Tennessee, not a lawyer. Neither were the Miranda warnings read to him (T. 140); nor had he been advised that he had a constitutional right to be represented by counsel prior to the waiver of his constitutional rights. Respectfully, the state of negotiations for immunity from prosecution in exchange for a waiver of constitutional rights and an agreement to cooperate is a "critical" stage at which petitioner should have been informed of his right to counsel. *White v. Maryland*, 373 U.S. 59, (1963), *Hamilton v. Alabama*, 368 U.S. 52, (1961), *Dukes v. Warden, Connecticut State Prison*, 406 U.S. 250, (1972), *People v. Andino*, 80 Misc. 2d 155, 362 N.Y.S. 2d 766, 770 (1974)

> In a very real sense, an arrested defendant's decision to "cooperate" with the authorities is a critical stage in the proceedings . . . . Whatever chance a defendant may have to trade information for more lenient treatment may be irretrievably lost by premature uncounseled disclosure. The presence of counsel will ensure against a totally one-sided bargain where the defendant disgorges

> all he has in return for a vague promise of some later consideration if the information is deemed satisfactory by some absent higher authority. (*People v. Andino*, supra.)

More particularly should this be the case when petitioner is under investigation by Federal Authorities. *Massiah v. United States*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387 (1977)

In the case at bar there is a dispute between an agent for the F.B.I. and the petitioner as to the precise limits of the Government's promise not to prosecute. Either the promise was not limited and thus included the indictment transaction or the petitioner was mislead by the agents into cooperating for less than for which he bargained. The dispute would have been avoided completely had the petitioner been represented by counsel.

None of the "misunderstanding" would have occurred had petitioner been represented by counsel. Certainly any "plea bargain" or "promise" would have included the Brinkley transaction. In the absence of representation by counsel the promise not to prosecute should be deemed to include the indictment transaction, and the indictment should be dismissed.

2. The constitutional rule of *Santobello v. New York*, 404 U.S. 257 (1971), as well as those in other circuits, require reversal.

The United States Supreme Court has established that there should be constitutional "fairness" in the securing of agreements between the accused and the prosecutor which result in pleas of guilty. *Santobello v. New York*, 404 U.S. 257 (1971)

We respectfully urge the same constitutional fairness is due a defendant during negotiations for immunity by him with the government. In this case constitutional fairness at the least would require (1) representation of the defendant by counsel; and (2) there being no misleading of the defendant by the government.

In *United States V. Krasn*, 614 F.2d 1229 (9th Cir. 1980) a similar question was before the court. In that case the defendant asserted in his defense for violation of the criminal antitrust laws that an earlier plea bargain agreement between the same defendant and the government included the antitrust violation as part of the agreement and that in any event due process required that the prosecutor disclose during the plea bargain negotiations that the defendant was under investigation. The Court of Appeals agreed there was a due process violation by the government's failure to disclose.

In *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2nd Cir. 1976) after quoting extensively from *Santobello*, supra, the court stated as follows:

> . . . Additionally, fundamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance.' *Correale v. United States*, 4790 F2d 944, 947 (1st Cir. 1973)."

In *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979) the Court of Appeals found constitutional error in the district court's refusal to enforce the government's plea *proposal*. The proposal had been withdrawn prior to acceptance. The Court of Appeals stated.

> ". . . we nonetheless conclude that right and violation of right was shown, and that relief must be given. This, of course, means that we find the constitutional right to 'fairness' to be wider in scope than that defined by the law of contract."

We now note without great detail as discussed in a previous point petitioner was not represented by counsel and was not advised that he has a right to counsel.

As important we note the other circumstances in this court which clearly demonstrate that the government has not been held to "meticulous standards of both promise and performance" in this case.

At the time of the June 7, 1978 meeting there were ongoing six different investigations involving German bonds and petitioner. All of these investigations were either being conducted by or being participated in by Corbett Hart of the Memphis office of the FBI. Indeed the primary investigation was that of Hart to determine the source of the German bonds which was being conducted out of the Memphis office.

It is undisputed that Corbett Hart had known petitioner since 1974 or 1975 and from January 1977 to and through the New York investigation and during the cooperation of petitioner was continually in contact with petitioner. It is undisputed that Corbett Hart negotiated with petitioner a promise not to prosecute him for something as the trial court has found; yet at the same time Hart was actively pursuing the petitioner on a series of different investigations.

We submit petitioner cooperation including four trips to New York and one trip to Atlanta, Georgia to aid the Government to find the source and petitioner's waiver of his rights to remain silent, among other rights, was a product of the misconduct of the federal agents in not properly defining and communicating objectively to the petition the precise limits of the promise and the indictment should be dismissed. We submit this conduct certainly does not meet "meticulous standards of both promise and performance."

3. The Eighth Circuits "Objective Standard" to be applied when viewing the evidence to determine the scope of the agreement is in conflict with the Fifth Circuits "Subjective Standard" to determine the scope of the agreement.

In the Eighth Circuit the test to determine the scope of the Government's agreement is whether "the evidence viewed objectively would lead one in the position of the defendants to reasonably conclude that the (nolo) pleas would be fully dispositive of all federal criminal matters." *United States v. Minnesota Mining & Mfg. Co.*, 551 F2d 1106 (8th Cir. 1977), *United States v. Thomas*, 593 F2d 615 (5th Cir. 1979)

The Fifth Circuits standard is whether when the defendant cooperated he had a reasonable subjective expectation that he would not be prosecuted. *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979), *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978).

We respectfully submit that the evidence in the case at bar reviewed by either standard is sufficient to require reversal. But there can be *no* doubt using the

Fifth circuits standard that the scope of the agreement included the indictment transaction. This Court should resolve the conflict in the circuits.

II.

THE COURT ERRED IN DENYING PETITIONER'S MOTION TO STRIKE THE TESTIMONY, OPINION AND FACTUAL, OF REINHARDT MINTKEN ON THE BASIS THAT THE GOVERNMENT DID NOT PRODUCE THE UNDERLYING DOCUMENTARY EVIDENCE AND SECRET SIGNS AND SYMBOLS UPON WHICH HIS TESTIMONY WAS BASED.

1. The existence of the privileged nature of the documents and information in question was a question for the court and the decision of the District Court and the Eighth Circuit Court of Appeals is in direct conflict with *United States v. Nixon*, 418 U.S. 683 (1974) and other cases in other circuits.

In *United States v. Nixon*, 418 U.S. 683 (1974) the president of the United States citing Article II of the United States Constitution asserted executive privilege to certain evidence subpoenaed by the Government to use to prosecute certain defendants. This Court held that the existence of the privilege was for the courts to determine, not the President of the United States. *United States v. Nixon*, 418 U.S. 683 (1974).

In *Crosby v. Pacific S.S. Lines*, 133 F2d 470 (9th Cir. 1943), it was held that the refusal to compel officers of the British Ministry to produce correspondence for inspection to determine its admissibility was error in the absence of a

showing of a basis of the officer's claim that the correspondence was confidential, or of a showing as to how the correspondence would jeopardize the public interest, safety or security.

Respectfully, the District Court should have determined the existence of the privilege and the scope of the privilege, not private German witness.

2. Constitutionally the Government waived the privileged nature of the information by indicating the petitioner.

In *United States v. Reynolds*, 345 U.S. 1 (1953) this Court recognized the rationale behind the theory that the Government in a criminal case waives any privilege it has when it prosecutes a defendant the Andolschek doctrine.

In *United States v. Andolschek*, 142 F2d 503 (2nd Cir. 1944) it was stated thusly:

> "While we must accept is as lawful for a *department of the government to suppress documents*, even when they will help determine controversies between third persons, we *cannot* agree that this should include *their suppression in a criminal prosecution*, founded upon those very dealings to which the documents relate, and whose criminality they will, or may tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transaction in the obscurity from which a trial will draw them, or it must expose them fully." (Emphasis Added)

Roviaro v. United States, 353 U.S. 60 (1957) held that under the circumstances of that case the identity of the informer should be revealed or the case dismissed.

In *United States v. Nixon*, 418 U.S. 683 (1974), the Court stated:

> "The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicity confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantess that no person shall be deprived of liberty without due process of law. It is the manifestduty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissiable evidence be produced."

In *United States v. Coplon*, 185 F.2d 629 (2nd Cir. 1950) it was stated:

> . . . However, the refusal to allow the defense to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf.

It is not enough that the petitioner was permitted to cross-examine Mintken with reference to his testimony. Justice Burger in *Davis v. Alaska*, 415 U.S. 315 (1974) stated as follows:

> "We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green *whether* he was biased,

> counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial . . . . defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Emphasis Supplied)

We note in that case a privilege of anonymity of juvenile offenders gave way to the constitutional right of confrontation.

In the case at bar, the German witness Mintken, a private citizen of Germany, would not produce the master lists and records upon which he based his testimony. Perhaps there are no lists, secret codes and records or perhaps he has misread the lists, secret codes or records. Perhaps this is a subterfuge to protect the utility.

Petitioner's constitutional rights of confrontation, cross-examination and due process guaranteed him under the Sixth Amendment and the Fifth Amendment of the United States Constitution were violated by the introduction of the testimony of Mintken.

3. THE PETITIONER'S RIGHT TO COMPULSORY PROCESS WAS DENIED HIM.

In this case the Government has produced a witness from the country of Germany to testify to an essential element of the Government's case against the petitioner. Germany and thus the witness Mintken and the Dresdner Bank wherein all of the documents and records are kept are all beyond the boundaries of the reach of petitioner's compulsory process. A hearing was not held by the court to

determine whether a privilege does indeed exist. Yet the Government was allowed to voluntarily produce the German witness but the Government and court do not require him to produce the records and documents upon which his testimony is based. And, the witness states he would not bring them even had he been asked. Petitioner asserts that the Government by the production of only the witness without the documents has violated its good faith duty implied under the Sixth Amendment Right to Compulsory Process.

This Court, in *Washington v. Texas*, 388 U.S. 14 (1967), established that under the Sixth Admendment the defendant has a right to present witnesses to establish a defense. In *Pettijohn v. Hall*, 599 F2d 476 (1st Cir. 1979) it was stated as follows:

> In the context of a criminal trial, the sixth amendment severely restricts a trial judge's discretion to reject such relevant evidence. Exclusion of relevant exculpatory evidence infringes upon the fundamental right of an accused to present witnesses in his own defense.

The Eighth Circuit recognizes this principle. In *United States v. White*, 562 F2d 587 (8th Cir. 1977) the court held that where no statement by a Swiss citizen was admitted into evidence and the Swiss citizen was beyond subpoena powers of court, Government had no obligation to produce a witness to testify even though the defendant requested his production. In *Taylor v. State of Minnesota*, 466 F2d 1119 (8th Cir. 1972) the court stated, "The evidence in this case does not show that the serving officer did not exercise due diligence in a good faith attempt at service. Absent such a showing, no violation of the right to

compulsory process can be found." Moreover, this Court applied this reasoning to uphold the trial court's refusal to permit the defendant to introduce certain testimony without permitting the Government to have his notes and adequately cross-examining him. *United States v. Nobles*, 422 U.S. 225 (1975).

Appellant has shown lack of good faith of the Government by the failure to request the documents of the witness and by voluntary production of the German witness.

CONCLUSION

Many of the questions raised in this petition were not addressed by the Eighth Circuit Court of Appeals. The privilege issue was not discussed though the District Court's oral order Appendix C assumed the proper foundation for its analysis. Of utmost importance to the efficient administration of justice in these United States is the belief and faith of the citizenry that every individual will receive a fair and impartial trial and a due process preview thereof in accordance with the established law of the land.

This petition should be granted.

Respectfully submitted,

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